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Supreme Court of the United States.

OCTOBER TERM, 1957.

No. 45.

UNITED STATES OF AMERICA,
Petitioner,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENT.

Opinions Below.

The oral opinion of the United States District Court for the District of Massachusetts (R. 33-34) is not reported. The opinion of the United States Court of Appeals for the First Circuit (R. 39-47) is reported at 236 F. 2d 101.

Jurisdiction.

The judgment of the Court of Appeals was entered on August 10, 1956 (R. 47). By order of Mr. Justice Frank-

further, dated November 5, 1956, the time for filing a petition for a writ of certiorari was extended to November 15, 1956 (R. 48). The petition was filed on November 13, 1956, and was granted on January 14, 1957 (R. 48). 352 U.S. 965. The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1).

Questions Presented.

For transportation services performed in 1950 against which only part payment was made, carrier-respondent sued Government-petitioner in 1953. The Government answered claiming a setoff credit pursuant to section 322 of the Transportation Act of 1940 for an alleged overpayment by it for transportation services performed in 1944.

The following questions are presented:

1. Whether section 322 of the Transportation Act of 1940 places upon a carrier-plaintiff the burden of setting forth in its complaint anything with respect to prior transportation contracts between the parties; or of making any showing that on an overall basis the Government-defendant has not overpaid the carrier thereon.

2. Whether said Act allows the Government as a counter-claimant to recover in setoff on the basis of an overpayment without sustaining the burden of proving such overpayment.

Statute Involved.

Section 322 of the Transportation Act of September 18, 1940, 54 Stat. 955, 49 U.S.C. 66, provides as follows:

> "Payment for transportation of the United States mail and of persons or property for or on behalf of

the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier."

Statement.

This action was brought by the respondent, The New York, New Haven and Hartford Railroad Company, under the Tucker Act, 24 Stat. 505, as amended, 28 U.S.C. 1346 (a) (2), to recover from the United States sums due for transportation services performed by the Railroad in the carriage of Government property in the year 1950 (R. 3-4). The pertinent facts in the case may be summarized as follows:

On August 8, 1950, the respondent delivered a carload of household effects to the petitioner at Newport, Rhode Island, thereby completing its performance of a transportation contract signed by the petitioner and bearing Government bill of lading No. N. 17377374 (R. 3). The lawful charges for these transportation services under applicable tariffs were $1143.03 (R. 3). The respondent on June 14, 1951, made demand upon the United States for payment of this sum, which demand was refused with the exception of the sum of $117.77 paid to the respondent by the United States on July 16, 1951 (R. 3, 5). Thereafter the respondent on May 14, 1953, filed suit in the District Court against the United States under the Tucker Act, demanding judgment in the amount of $1143.03 due and owing on the 1950

shipment (R. 3-4). The substitute answer filed by the United States admitted the respondent's performance of the 1950 transportation service and the correctness of the respondent's charges therefor (R. 5). However, in this answer the petitioner denied that the sum of $1143.03 was due and owing, claiming that the respondent was allowed the full amount of the sum sued upon with $117.77 being paid by check in 1951 and the balance of $1025.26 being credited under the provisions of section 322 of the Transportation Act of 1940, on account of alleged overpayments previously made by the United States on certain designated transportation bills submitted by the respondent for the transportation of goods in 1944 (R. 5). The answer set forth as the grounds for the petitioner's determination of overpayment the statement that charges in the 1944 bills had been computed on the basis of the size of the freight car furnished and used and not on the basis of the size of the car ordered by the United States (R. 5). The petitioner further alleged in its answer that the respondent at no time furnished the Government with facts respecting its failure to supply cars of the size ordered (R. 5). To this pleading the respondent filed a reply admitting the receipt of the check in the amount of $117.77 but denying that it had overcharged the United States with respect to the four shipments in 1944 (R. 5-6). The respondent further alleged that the "defendant's determination of overpayment was arbitrary and capricious in that Service Order No. 68 as issued by the Interstate Commerce Commission on 30 January 1942 was in full force and effect and applicable thereto," and that "the plaintiff . . . fulfilled its every obligation with respect to providing the defendant with any facts pertaining to such transportation" (R. 6).

In 1942, as a wartime measure to effect economies in the use of railroad cars, the Interstate Commerce Commission

issued Service Order No. 68, which suspended the provisions of section 6(a) of Rule 34 of the rules of the Interstate Commerce Commission. In pertinent part this latter rule specified that, if a carrier was unable to furnish a car of the length ordered and therefore substituted a longer car, it could legally charge the shipper only on the basis of the size of the car ordered. With the suspension effected by Service Order 68 the carrier could thereafter legally make charges for the size of the car furnished in those instances where it was unable to supply a car of the length ordered.

With respect to the 1944 shipments it appears that the initial carrier had furnished on each occasion a car of greater length than that ordered, and subsequently the respondent, as the terminal carrier, had presented bills to the Government at the rate applicable to cars of the size furnished (R. 21, 22, 24, 25, 26). Pursuant to section 322 of the Transportation Act of 1940 these bills were paid (R. 21, 23, 24, 25, 27). Some six years later, however, the bills were post-audited by the General Accounting Office and, without undertaking to determine the important extrinsic fact necessary to establish that there had, in fact, been an overcharge in 1944, namely, whether the initial carrier was able to supply freight cars of the smaller sizes ordered, the General Accounting Office made a deduction from a bill submitted by the respondent in June, 1951 (covering charges on the 1950 transportation sued upon), in the amount of the difference between the charges for the cars ordered and those furnished (R. 22, 23, 25, 26, 27).

On these facts and the state of the pleadings before it, the District Court ruled that, in order for the plaintiff to recover, it need allege nothing beyond the facts of the particular 1950 shipment set forth in the complaint, the bill for which transportation the United States had refused to pay (R. 33). The Court reasoned that, since the plain-

tiff had brought suit upon a particular contract of transportation, other contracts claimed by way of setoff or otherwise would have to be set up in the defendant's answer and proved by the defendant (R. 39-40).

Thereafter the Railroad filed a motion for summary judgment with affidavit attached demanding judgment in the sum of $402.84,[1] and the United States moved for judgment in its favor on the ground that the Railroad had "failed to plead facts entitling it to recover herein" (R. 34-36). On November 23, 1955, the District Court entered judgment for the Railroad in the reduced amount of $402.84 and at the same time denied the petitioner's motion for judgment (R. 37-38). The Court of Appeals affirmed (R. 39-47).

In its opinion the Court of Appeals rejects the construction of section 322 urged upon it by the petitioner to the effect that, when a deduction is made by the Government upon post-audit against an amount due the carrier on another transaction, then in order for the carrier to recover the amount admittedly due on the subsequent transaction it would have the burden of alleging and establishing that there was no overpayment in the prior transaction used by the Government by way of setoff. The Court found "no language in § 322 justifying this extraordinary result" (R. 44). The Court reasoned that this would upset the established order of things; and that, if the intent of Congress had been to accomplish such result, it certainly would have used appropriate language to that end. In the Court's view "All that § 322 does is to authorize and direct disbursing officers of the United States to pay transportation bills upon presentation, without waiting for audit or settlement by the General Accounting Office. This the

[1] The reduction in the respondent's demand for judgment resulted from administrative negotiations wherein the parties agreed that the Government should be allowed a credit of $622.42 (R. 36).

United States might choose to do, just as a private shipper might pay the bills rendered by a carrier without making an audit" (R. 44).

Summary of Argument.

I.

A. Respondent in the case at bar brought suit in contract to recover for transportation services rendered in 1950. It alleged in its complaint all essential facts entitling it to relief, including the performance of the transportation services, the correctness of the charges therefor, proper demand and refusal of demand. But the petitioner, in effect, has taken the position that before respondent may recover in the case at bar it has to sustain the additional burden of proving that the Government had not made overpayments on prior unrelated contracts interposed by the Government by way of setoff.

It is manifest that such an unusual contention runs directly counter to judicial rules of proper pleading and proof and can find no support in precedent whatsoever. Petitioner argues, however, that, because it had to pay the carrier's bills for the earlier transportation contracts upon presentation under section 322, the Court must view the litigation as if the carrier were really suing on the original transaction, which served as a basis for an administrative deduction by the Government under section 322. An acceptance of petitioner's view would require this Court to ignore the allegations of the complaint and look to the defendant rather than the plaintiff as the party who shapes the issues to be tried. In addition, the petitioner would be denied a right to elect as to which facts or transactions it preferred to declare upon, *i.e.*, the bill for subsequent transportation services or the earlier bill. Such results are

clearly contrary to legal principles and can find no justification in section 322 either by express language or by necessary implication. There is nothing in that law which requires a holding that, when a carrier, such as respondent here, sues upon a simple contract for transportation services setting forth in its complaint a claim clearly showing that it is entitled to relief, which the Government concedes, the carrier may not recover, just because the Government in its answer has made references to certain prior transportation bills with the mere assertion, unbacked by any proof, that it overpaid the carrier on its bills.

B. Section 322 in no sense adds to the burdens of a common carrier in a suit to recover transportation charges. The provision allowing the Government to deduct the amount of any overpayment to a carrier from subsequent bills did not create a new right but was a statutory reflection of a right already existing at common law. *Gratiot* v. *United States*, 15 Pet. 336, 370 (1841). Section 322 specifies nothing in regard to burdens of proof, burdens of evidence or burdens of going forward and must be construed as leaving intact ordinary rules of evidence and other principles of judicial procedure. Nothing in the background of that Act or the problems which it was designed to meet shows that section 322 was intended to assume the proportions of giving an administrative determination finality, or of placing any greater onus upon a carrier to sustain its claim for transportation services than existed prior to the enactment of that section. *Seaboard Surety Co.* v. *United States* (1946, Ct. Cls.), 67 F. Supp. 969.

II.

A. Petitioner here occupies the position of a counterclaimant and according to established legal principles it has the same burden of proving the validity of its counter-

claim as any other claimant. *Co-efficient Foundation, Inc.*, v. *Woods* (1948, 5 Cir.), 171 F. 2d 691, 694. Since it is seeking to set off against an admittedly valid claim a claim which it asserts arises out of another transaction, the petitioner has the burden of persuading the Court as to the validity of its offset. *Atlantic Coast Line Railroad Co.* v. *United States*, 140 F. Supp. 569. No exception to these principles can be invoked in favor of the United States. *Atchison, Topeka & Santa Fe Railway Co.* v. *United States*, 94 F. Supp. 677. *Allis-Chalmers Manufacturing Co.* v. *United States*, 79 Ct. Cls. 453, 462. There is no language in section 322 to indicate that its provisions were intended to change this established order in regard to carriers' claims for transportation services. If that had been the intent of Congress, it would have so specified in plain language, which it did not. Nor can any reading of the deduction provision in section 322 lead to the result that an exercise of the right to deduct places the Government in the favorable position of requiring the carrier to disprove the validity of the offset when it sues to recover charges for later transportation services. Since, as we have seen, the deduction provision was but a statutory reflection of a pre-existing right in the Government, the question whether a deduction was proper still remains a question to be adjudicated when raised in judicial proceedings. *Illinois Surety Co.* v. *United States*, 240 U.S. 214. Thus the Court of Appeals clearly held the Government in the instant litigation to the same burdens and requirements as any other counterclaimant. The recent decision of this Court in *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59, does not require a contrary holding. The Court there was not concerned with what, if any, impact section 322 had upon rules of evidence and proper procedure such as those mentioned above. Its reference to section 322 was for the sole purpose of showing that the Government need not

bring anticipatory suits for reparation in order to raise the issue of unreasonableness of a tariff but under section 322 it may make an administrative deduction and save such issues for such time as later judicial proceedings are initiated.

B. The Government has not made out a prima facie case. The Court of Appeals found that this was not a proper case either for the creation of a presumption as to availability of cars of the size ordered or for application of the rule of evidence that the burden is upon a party to establish those facts which are peculiarly within its knowledge. Presumptions and rules of evidence like those in question are, in the final analysis, grounded upon considerations of fairness and experience. In the absence of Congress specifying anything on the subject, the Court of Appeals held that reasons of fairness and experience did not require it to create a presumption as to availability of cars in the case before it. In the present case the Court of Appeals found that it would be manifestly unfair to let judgment go against the respondent on this issue alone since the Government had put off post-auditing of these bills for fully six years after the charges were initially paid.

In addition, the history of Service Order 68 and the repeated efforts of at least one branch of the Government to have it repealed show, contrary to petitioner's assertion, that the facts as to availability of freight cars were by no means peculiarly within the knowledge of carriers but were equally accessible to the Government.

Argument.

The opinion of the Court of Appeals for the First Circuit bespeaks the care and consideration expended to protect against unauthorized encroachment those legal prin-

ciples so fundamental in our body of law, including a plaintiff's right to choose the forum; to shape the issues; and to demand proof of a setoff or counterclaim.

Petitioner here would have all that changed whenever the United States is a counterclaimant against a railroad carrier; and its only hope for such preferential treatment lies in section 322 of the Transportation Act of 1940.

The Court of Appeals held that section 322 had no such property.

After an exhaustive treatment of all facets of petitioner's claim, including an obiter consideration and the resulting rejection of a theory of rebuttable presumption, the Court concluded that the only course open to it was to affirm the judgment of the District Court; which it did.

The following argument shows the character of this simple action on a contract; and a brief demonstration of the impact of section 322. In our second point we show that the Government is like any other counterclaimant; and we add a complete refutation of petitioner's claim of prima facie case on its counterclaim.

I.

Section 322 of the Transportation Act of 1940 does Not Place upon a Carrier-Plaintiff the Burden of Setting Forth in its Complaint Anything with Respect to Prior Transportation Contracts between the Parties; or of Making Any Showing that on an Overall Basis the Government-Defendant has Not Overpaid the Carrier Thereon.

A. This Action is a Simple Suit on a Contract to Recover Sums Due for Transportation Services Performed in 1950.

This litigation was commenced by the respondent as a suit on a contract entered into between the respondent Railroad

and the Government for the performance of certain transportation services by the former in the year 1950. The Railroad duly performed and submitted a bill for its services which the Government refused to pay in full. After the usual exchange of administrative views and opinions, the matter became stalemate. At this point respondent had but one alternative: it could give in to the petitioner or it could bring the matter before a third party with power to decide the issue. Petitioner, although a sovereign, had ceded the right to be sued. Respondent did so by filing a complaint in the United States District Court for the District of Massachusetts alleging performance of the contract of transportation, the lawful charges assessable therefor under applicable tariffs, demand upon the petitioner for payment of these charges and refusal of demand; all of which the Government in its substitute answer admitted. Contrary to the contention of the petitioner, it is not pertinent to this case that the respondent's suit could have been brought in the Court of Claims. Apparently, petitioner prefers the procedural rules of that Court. In its brief, at page 48, petitioner sets out verbatim a Memorandum Order as to Procedure issued by the Court of Claims. If the respondent had elected to sue in that Court, it would have complied with all of the procedural rules thereof. However, the fact is that the suit was not brought in the Court of Claims, and therefore the procedural rules of that Court are not applicable to this case.

The complaint and the admissions in the Government's answer clearly demonstrated that the respondent had a valid claim entitling it to relief, which should be granted unless the Government could defeat recovery by setting forth other matters in its possession by way of defense or counterclaim. This the Government attempted to do by referring in its substitute answer to certain alleged overpayments made by the Government on designated transporta-

tion bills submitted by respondent to the Government in 1944; and claiming a setoff under section 322 of the Transportation Act of 1940. On this state of the pleadings and evidence the Government contended in the District Court that respondent was not entitled to recover, despite the admissions made by the Government, unless the respondent made a showing that the Government had not made overpayments on the prior bills referred to in petitioner's substitute answer.

There was thus presented for the Court's determination a simple issue which this respondent submits is basic to this entire litigation; that is, an issue of proper pleading and proof.

The District Court rejected the Government's contention, ruling "as a matter of law that it is not the burden of the plaintiff to set forth in this complaint anything with respect to those prior transportation contracts; and it is not the burden of the plaintiff to make any showing that on an overall basis the government has not overpaid the plaintiff" (R. 33-34).

The respondent takes pains to emphasize the beginnings of this case and the proceedings while it was before the Court of first impression in order to bring into clear focus what it maintains is now and has always been the petitioner's chief contention in the instant litigation: the Government says that, in order for a claimant to prevail in a simple action of contract, it must not only plead and prove its own claim, but, in addition, must disprove any claim of its opponent interposed by way of counterclaim or setoff. An acceptance of this proposition as applicable to the facts of this case would subvert and render nugatory orderly rules of pleading and practice founded in logic and common sense and long accepted and adhered to by courts of law. Presumably, petitioner finds justification for such a departure from the established order by reliance upon another

principle which it apparently claims to be all-embracing, namely, that claimants against the Government have been traditionally required to establish the validity of their claims. However, granting the correctness of this proposition, it does not appear that its invocation here is helpful since, as respondent has demonstrated, its "claim" in this litigation is for transportation charges earned in 1950 by virtue of delivery of a carload of household effects to the petitioner at Newport, Rhode Island. The "validity" of the claim depends upon the contract and the applicable tariffs, both of which the petitioner admits in paragraphs 2 and 3 of its substitute answer (R. 4, 5). Thus, as a claimant against the Government in this case, the respondent has "established" the validity of its claim. In addition, as we shall demonstrate later, there is another principle, equally valid, which specifies that, when the Government in turn assumes the position of a counterclaimant, it has to establish the validity of its counterclaim.

But petitioner argues that, looking to realities, respondent in this proceeding is seeking to recover funds recouped from it on account of 1944 transportation services and as to its entitlement to such funds the respondent has the burden of proof. The respondent submits that the realities of the situation are that when it submitted its bill for transportation services rendered in 1950 the Government made only a part payment thereon and refused to pay the balance. The further realities are that, when respondent thereafter brought suit to recover the balance not paid, the Government did not set forth the grounds for its setoff nor did it justify the same in accordance with judicially accepted principles and procedures applicable to all litigants alike, including the United States Government.

According to the construction urged upon this Honorable Court by the petitioner, with the enactment of section 322 of the Transportation Act of 1940 a plaintiff must there-

after, in every case, sue on the original transaction to recover an administrative deduction, or at least in those instances where it failed to do so the Court must entirely disregard the declaration and pleadings as drawn and require the claimant to proceed as if it had sued on the original transaction. Thus, if petitioner's interpretation is accepted, claimants are stripped of any right of election to sue on the bill from which the deduction is made [2] and any complaint in which they attempt to do so is, according to petitioner, "artfully elliptical."

Petitioner does not and cannot point to any specific language in section 322 which would take away from a claimant his right to choose, from amongst methods of proceeding, that particular course which the claimant feels on the overall will be most likely to assure a successful outcome. In other contexts, as this Court well knows, the plaintiff as the party bringing suit undoubtedly has a certain advantage which accrues from the fact that it is the party who first frames the issues as the basis for litigation in its complaint. While under the modern practice contemplated by the Federal Rules of Civil Procedure the function of the complaint has sometimes been held to be primarily that of notice-giving, the respondent submits that it also has the additional function of shaping the issues to be tried. *Emery* v. *Chicago, Burlington & Quincy Railroad Co.*, 119 F. Supp. 654. *The Creek*, 8 F.R.D. 118.

In *The Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22, 33 S. Ct. 410, 57 L. Ed. 716, where the question for decision was whether the Court had jurisdiction to hear the case under the patent or other laws of the United States, Mr. Justice Holmes, speaking for the Court, said at page 25:

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[2] It appears that a claimant had the right prior to enactment of section 322 to make an election between a suit on the deduction or on the subsequent bill due to existence of the Government's common-law right of setoff.

"Of course the party who brings a suit is master to decide what law he will rely upon and therefore does determine whether he will bring a 'suit arising under' the patent or other law of the United States by his declaration or bill. That question cannot depend upon the answer, and accordingly jurisdiction cannot be conferred by the defence even when anticipated and replied to in the bill."

Respondent Railroad submits that it is no less master to decide whether to bring suit upon its 1950 transportation bill, as it has done here, or whether to sue to recover the deduction. It was master to so decide prior to the enactment of section 322 of the Transportation Act of 1940 and continued to be master to decide thereafter unless Congress expressly provided otherwise in that Act. This Congress did not do.

Contrary to the history of legal principles, the petitioner urges that section 322 must be read as showing an intention of Congress that claimants subject to the procedure arising out of section 322 may never bring suit upon the transportation bill from which a deduction has been made, since otherwise the results illustrated by petitioner in its brief and therein characterized as "anomalous" would occur. The respondent does not deny that a claimant's election to proceed along one or more different avenues open to it might be decisive as to various incidents of the litigation, such as the proper allocation of burden of proof. However, respondent contends that this has always been the case, not only in litigation involving suits against the United States on claims from which amounts have been offset by the Government, but in other types of litigation as well. If the possibility that results will differ in given cases, depending upon which operative-facts claimant chooses to declare upon, might be described as anomalous, then respondent believes that such anomalies (attributed by petitioner to the Court of Appeals' interpretation of section 322) must

in the last analysis be balanced against the more drastic results which would follow from petitioner's interpretation of section 322, *i.e.*, that a claimant may no longer make an election as to which facts or transactions he will sue upon, that the complaint may not be looked to as formulating the issues to be tried, that a claimant who sets forth a claim clearly showing that it is entitled to relief may not recover unless it also demonstrates the falsity of its opponent's counterclaim, that one who sets up a counterclaim need not carry the burden of proving its validity, etc. When these various factors are properly weighed and accorded their relative importance, the anomalies depicted by petitioner lose much of their power to terrify and the strained interpretation of section 322 urged by petitioner to eliminate the specter emerges as the only real horror. Respondent, on the other hand, contends that, if section 322 is to have an effective operation as a procedure provided by Congress to take effect primarily on the administrative level, it must not be allowed to interfere with fundamental rules of evidence and judicial practice when a controversy has been removed from the stage of administrative handling and transferred to a court of law.

With a view to convincing the Court that the litigation instituted by respondent is not a simple suit on a contract for 1950 transportation services, but really a suit by respondent on 1944 transportation, petitioner reminds this Court that it has on previous occasions "looked through form to substance in delineating the issue when an action is brought following an administrative deduction from an undisputed claim." In support of its position the petitioner cites the cases of *Reynolds* v. *United States*, 292 U.S. 443, and *Alcoa Steamship Co., Inc.*, v. *United States*, 338 U.S. 421, in the body of its Brief and refers in a footnote to *United States* v. *Chesapeake & Ohio Railway Co.*, 352 U.S. 77. From a reading of these cases it is not apparent, as

petitioner contends in its Brief, that the claimants therein brought suit on the conceded claim, but, to the contrary, it appears that they sued directly to recover the amount deducted. This difference alone would explain why the Court in the *Alcoa* and *Chesapeake* cases treated as the issue to be decided questions arising from the earlier transaction. But even if suit had been on the conceded claim, this Court's focusing on the earlier transaction as presenting the issue to be decided is not inconsistent with respondent's position here, since it appears that the parties themselves had joined issue on that point by their pleadings and contentions. That was not the case in the instant litigation. In the District Court the Government by its pleadings and contentions had raised quite another issue. As that Court stated, "The issue which is just at the moment raised is whether the plaintiff must show anything except the liability of the government with respect to this alleged contractual obligation" (R. 31). It does not appear that in any of the cited cases issues were raised and dealt with by the Court as to principles of practice and rules of evidence such as the proper allocation of burden of proof as between a claimant and a counterclaimant, issues which are dispositive of the case at bar. The *Reynolds* case, cited by petitioner, is not authority for the proposition that this Court may disregard the allegations of a party's complaint which clearly state a claim for relief and consider the litigation as if plaintiff were actually declaring upon other contracts between the parties, interposed by the defendant for the first time by way of setoff or counterclaim. In that case the petitioner brought suit in the Court of Claims against the United States for money *deducted* from his pension on account of board furnished while an inmate of a Government hospital. Actually, contrary to petitioner's contention, the case cannot stand for the proposition that the Court "looks through" form to

substance, because there was no "form" to look through. This Court said of the Court of Claims reference to the prerogative of the Director of the Veterans Bureau to make certain determinations (at page 446): "Granting the correctness of this view, we are of the opinion that it does not apply in this case." Above all, in that case the Court did not ignore the allegations of the complaint or regard the action as something different from what it was.

In sum, the respondent submits that, despite the attempts by the Government to cloud the essential facts, the case at bar is a simple suit in contract to recover for transportation services performed in 1950.

B. Section 322 Added No Burden to Respondent Here.

There is nothing born out of section 322 of the Transportation Act of 1940 that adds to the burdens of respondent in this action; or that relieves the burdens of petitioner.

Section 322 was promulgated as a wartime exigency to stabilize the economy. At that time the Government was the railroad carriers' most extensive user. Practically all of the railroads' revenue was represented by Government accounts receivable. The situation had ominous forebodings for the railroads as early as 1937. It was obvious that the key to the log-jam was the custom of the Government to defer all payments for transportation charges until an audit of each charge by the Government Accounting Office could be had. Possibly the railroads could have relied upon their legal right to refuse delivery at destination until the transportation charges were paid, as it could do in the case of the ordinary shipper. However, the solution, to be effective, had to get money flowing into the railroads so they in turn could pay their employes and their credi-

tors and so on into the financial blood stream of the national economy. The problem to be solved was a national problem; and the answer had to be national, not just a panacea of railroad ills.

Throughout the legislative history of that Act nothing was said or done from which the inference could be made that either the Government or the railroads thought or intended to sponsor the enactment of judicial rules of procedure. Nothing therein indicates any intent to create any impact upon burdens of proof, burdens of evidence or burdens of going forward.

Section 322 solved the problem of the financial plight of the railroads and other common carriers. By law, the Government was thereafter authorized and directed to pay for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier "upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, . . ." However, except for the elimination of the pre-audit procedure of payment by the Government, section 322 added nothing new to the common carrier-shipper relationship. It did provide a statutory reflection of the right of the Government to set off overpayments. The section concludes with the words: ". . . but the right is reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier." But that was not the creation of a new right. As the Court of Appeals below expressed it: "We suppose that this provision was inserted out of an abundance of caution, because the availability of a setoff by the United States need not depend upon specific statutory authorization" (R. 45). The Court cited *Gratiot* v. *United States*, 15 Pet. 336, 370 (1841), wherein Mr. Justice Story held for the Court:

> "The United States possesses the general right to apply all sums due for such pay and emoluments, to the extinguishment of any balances due to them by the defendant on any other account, whether owed by him as a private individual, or as chief engineer. It is but the exercise of the common right, which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him."[3]

In addition to the unwarranted assumption that section 322 created a new right of setoff in the Government, the petitioner accords a strange construction to the phrase "the amount of any overpayment" as it appears therein. Petitioner urges that the mere unilateral assertion by some accounting officer that an overpayment exists is a "finding" of an amount due. The Court of Appeals rejected that reasoning in pointing out that whether an overpayment existed or not depended upon the establishment of an extrinsic fact which the record indicates the petitioner did not undertake to determine.

> "This means that, before the claimed setoff must be accepted in a judicial proceeding, the existence of such overpayment must be objectively determined, in fact and in law; it is not enough merely that some accounting officer has unilaterally asserted the existence of such overpayment." (R. 45.)

This disposition on the part of petitioner to insist upon a prerogative in the Government to determine with finality

[3] See also *Wisconsin Central Railroad Co.* v. *United States* (1896), 164 U.S. 190, 206-210.

what is and what is not an overpayment is difficult to understand in contemplation of the practical mechanics of a post audit setoff under section 322. It must be remembered that the assessment of charges by the railroads and the appraisal of those charges by the Government are activities assigned to the extreme skills of experienced personnel by each party. Neither side rejects the administrative opinion of the other simply because it wants to have the last word. Each side has sound reasons for holding its position. In the vast majority of instances the experts on both sides agree as to the proper rate or classification and the controversy is resolved by administrative adjustment. Thus it seems both unreasonable and unjust to force acceptance of the Government's view where there is honest disagreement between the parties. The right of offset does not give the Government a superior legal or equitable claim to the funds in its hands, nor does such right of offset give the administrative settlement finality. *Seaboard Surety Co.* v. *United States* (1946, Ct. Cls.), 67 F. Supp. 969, 971. Ordinarily submission to arbitration would be the solution, but there is no provision for arbitration in these cases. That leaves open only one course: judicial determination.

Judicial determination is open to either the Government or the carrier. But as a practical matter the Government does not have to resort to initiating legal action in most cases, because it always owes the railroads for transportation charges and thus can exercise its "common right, which belongs to every creditor." [4] The same privilege is available to the railroads in any case where they are claiming an undercharge to the Government and they have funds due the Government in their possession. It is easily understood, however, that the shoe is seldom on that foot. So, in

[4] *Gratiot* v. *United States, supra.*

the usual pattern, the railroad has to seek outside help to get an enforceable determination as to whether or not there was an overpayment by the Government; and, as mentioned above, recourse is had of the courts. Whenever a railroad brings an action against the Government, directly upon the deduction, it has the burden of alleging and proving the facts of the case and establishing the validity of its claim in the light of the contract and the applicable tariffs. For example, if in the case at bar the respondent had sued to recover the alleged 1944 "overpayment," it would have the duty of proving the correctness of its 1944 bill. And that duty would embrace adherence to all pertinent rules of procedure, including burdens of proof and of evidence.

But to hold that section 322 provides that in every case and under every circumstance the burden of proving either the correctness of its own contentions as to applicable tariffs or the incorrectness of the Government's contentions thereon is on the carrier is to give to simple, ordinary words a meaning unrecognized in common usage.

Neither legislative history nor the letter of Mr. Pelley[5] urges or indicates a necessity or desire for the enactment of changes in legal principles and practices of proof. If such is made mandatory by the inability of the petitioner here to meet the requirements of present legal standards applicable to counterclaimants, a resort to the Congress can be had.

In its present posture section 322 adds no new burden to a plaintiff facing the Government as a counterclaimant.

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[5] Mr. J. J. Pelley, as president of the Association of American Railroads, addressed a letter, under date of October 5, 1937, to Captain H. E. Collins, Assistant Director, Procurement Division, Treasury Department, urging that something be done to enable the railroads to get their transportation charges paid within a reasonable time.

II.

SECTION 322 OF THE TRANSPORTATION ACT DOES NOT ALLOW THE GOVERNMENT, AS A COUNTERCLAIMANT, TO RECOVER IN SETOFF ON THE BASIS OF AN ALLEGED OVERPAYMENT WITHOUT SUSTAINING THE BURDEN OF PROVING SUCH OVERPAYMENT.

A. The Government must Sustain Same Burdens As Any Other Counterclaimant.

A cursory examination of the pleadings in the instant litigation shows that the position of the United States in this case is essentially that of a counterclaimant seeking to set off against funds due for 1950 transportation services other sums which it claims are owing to it on account of alleged overpayments made earlier. Thus, by its answer, the Government said (R. 4, 5) that it did not owe respondent carrier the amount claimed for the service of transporting household effects in 1950, because respondent carrier owed the Government money arising from previous unrelated contracts. Because that claim of the Government had nothing whatsoever to do with the claim on which the case at bar is based, the only means of setoff on the part of the Government is in the nature of a permissive counterclaim under Federal Rules of Civil Procedure, Rule 13(b), 28 U.S.C. *Fraser* v. *Astra Steamship Corp.* (1955, N.Y.), 18 F.R.D. 240, 242.

It is an elemental rule of evidence that he who sets up a counterclaim has the same burden of proving its validity as any other claimant. *Co-efficient Foundation* v. *Woods* (1948, 5 Cir.), 171 F. 2d 691, 694; rehearing denied, January 10, 1949. *Bethlehem Steel Co.* v. *United States*, 75 Ct. Cls. 845. *Heid Bros., Inc.*, v. *United States*, 65 Ct. Cls. 87. In *Allis-Chalmers Manufacturing Co.* v. *United States*, 79 Ct. Cls. 453, 462, the Court of Claims recognized this principle.

stating: "The burden is on the defendant to establish its counterclaim and the rule is well settled that the same character of proof is required to establish a counterclaim as to sustain any other claim." The Courts have held that no exception to this rule may be invoked in favor of the United States, but that it must sustain the same burdens as any private suitor when it assumes the position of counterclaimant. *Atchison, Topeka & Santa Fe Railway Co.* v. *United States*, 94 F. Supp. 677, 679. *Allis-Chalmers Manufacturing Co.* v. *United States, supra.*[6]

Thus it is seen that, prior to the enactment of section 322, whenever the Government sought relief by way of counterclaim, no matter what the nature of the litigation, it had to plead and prove the same. With the passage of section 322, however, according to petitioner, that was no longer to be the case in regard to litigation between the Government and carriers involving transportation charges, but carriers must, in every case, carry the burden of disproving the Government's setoff or counterclaim. Petitioner is not fazed by the fact that, in order to sustain its interpretation of section 322, this Court would have to find that the Congress which enacted that section also intended to work a fundamental change in the long-established judicial principles mentioned above, without even so much as alluding to them. Recognizing that this would be an extraordinary result for which there is no justification in the language of section 322, the Court of Appeals rejected petitioner's construction and held it to the very same burdens and requirements as any other counterclaimant in the suit before

[6] The holdings in these decisions were foreshadowed in *United States* v. *Norwegian Barque "Thekla"* (1924), 266 U.S. 328, where Mr. Justice Holmes speaking for the Court, said: "When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter."

it. In doing so the Court of Appeals agreed with *Atlantic Coast Line Railroad Co.* v. *United States*, 140 F. Supp. 569, quoting with approval the following statement appearing at page 572 of the Court of Claims decision:

> "Since the Government is seeking to set off against an admittedly valid claim, a claim which it asserts arises out of another transaction, it has the burden of persuading us as to the validity of its offset."

The Court of Appeals gave a practical, commonsense construction to section 322, holding that its effect in a case like that at bar was to bring the United States into closer parity to a private shipper.[7]

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[7] In two footnotes of its Brief the Government takes issue with the Court of Appeals' conclusion that "the position of the United States as shipper, so far as the present case is concerned, is no different from that of a private shipper" (R. 43). That Court had expressed the opinion that, under section 3(2) of the Interstate Commerce Act (49 U.S.C. 3(2)), carriers were not required by law to relinquish possession of a shipment to the United States at destination prior to payment (R. 43). The Government, in footnote 8 of its Brief, makes the bald assertion that "By its terms, Section 3(2) is inapplicable to transportation services furnished to governmental units." A reading of section 3(2) itself shows that this statement by the Government is incorrect. It is true that section 3(2) does make a distinction between the United States and other shippers but only to the extent of providing that "the provisions of this paragraph shall not be construed to prohibit any carrier . . . from extending credit in connection with rates and charges on freight transported for the United States . . ." Although a carrier may treat the United States and private shippers differently under section 3(2) insofar as the extension of credit is concerned, there is nothing in that section which requires carriers to extend credit to the United States and thus prevents them from treating the Government and private shippers alike in this respect as in others. Again the Government in its Brief attempts to refute the Court of Appeals on this point by stating in footnote 21 that "The private shipper, who is re-

The respondent submits that the only confusion present in this case is due to petitioner's failing to relegate to its proper field of activity the procedure comprehended by section 322. That section concerns itself wholly with the payment policy provided for the Government by Congress regarding transportation charges. It was directed to the administrative practice of payment and settlement of accounts between carrier and the Government. That is, it conferred upon the agents of the United States authority to make payment upon presentation, substituting a post-audit for a pre-audit and, in addition, confirmed the pre-existing right of the Government to deduct any amount of administratively determined overpayments from subse-

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quired by section 3(2) of the Interstate Commerce Act, 49 U.S.C. 3(2), to pay freight charges promptly, cannot set off an overpayment against the charges for other transportation services rendered to it." The Government then goes on to reason that, since Congress has expressly included in section 322 this right of setoff on the part of the Government the Court of Appeals was in error when it likened the position of the United States as shipper to that of private shippers. The difficulty with this reasoning again is that the initial statement made by the Government is clearly erroneous. A private carrier may be in the same position as the United States to set off a claimed overpayment against charges for other transportation services. A proper reading of section 3(2) shows that both a private shipper and the United States may obtain credit for transportation services rendered; in the case of the United States by negotiation between the parties; in the case of a private shipper under "rules and regulations" prescribed by the Commission "to govern the settlement of all such rates and charges and to prevent unjust discrimination." See, in this respect, *Ex parte No. 73*, 57 I.C.C. 591, and Interstate Commerce Commission's "Order of 4th day of June, A.D. 1920," allowing carriers to extend credit for a period of ninety-six hours to shippers under prescribed conditions and limitations. Under the extension of credit thus made possible, a private shipper, by relying upon its common-law right of setoff, may set off earlier overcharges against subsequent freight bills. Thus there is no such disparity between the United States and a private shipper as contended for by petitioner.

quent transportation bills. There is nothing to indicate, however, that this section was intended to have a further effect once a dispute as to proper charges had been transferred from the stage of administrative handling to a judicial proceeding. It is thus important to keep in sight two separate levels or stages in which a carrier's claim for transportation services might be involved, *i.e.*, an administrative stage and a judicial stage. Undoubtedly the Government's payment policy will have certain collateral effects, including an impact upon later judicial proceedings. As the Court of Appeals pointed out (R. 45), the fact of payment or withholding of payment may influence subsequent litigation to the extent of determining which party shall carry the burden of proof and the burden of allegation. This is so because rules of evidence do not operate in a vacuum but take effect within the context of the actions of the parties. However, granting this connection and interaction between the Government's payment policy and subsequent judicial proceedings, it does not follow that a law whose only manifest purpose was to alter that payment policy must also be held to have the further effect of changing customary rules of procedure and practice adopted by courts of law. If that were the intent of Congress, it would have so specified in plain language. Yet petitioner reads the deduction provision of section 322 as accomplishing that result. According to its construction the reservation of a right to deduct the amount of any overpayment is tantamount to the conferral by Congress of a right upon the United States to require carriers to be put to the burden of disproving the propriety of a deduction. As we have previously mentioned, the right to setoff on the part of the Government is not new, and it was not created originally by the Transportation Act of 1940. The actual wording of the deduction provision indicates that the Congress which enacted section 322 was cognizant of that fact, since, in

dealing with the Government's right to deduct, it made use of the word "reserved," which indicates a confirmation of that which was already in existence, rather than another word, such as, "conferred," which would tend to show an intent to give something for the first time. But, in so confirming a pre-existing right, Congress, in no sense, added a new force or effect to such right.

The Court of Appeals interpreted the deduction provision in this light, refusing to lend to it any new function or operation attributed to its inclusion in section 322 by petitioner. By language quoted earlier in this Brief, that Court held, in effect, that whether or not an overpayment actually existed was a question to be decided by a court of law when the propriety of a deduction was brought into question in judicial proceedings. In so treating the deduction provision within the context of section 322 the Court of Appeals followed earlier authority dealing with the operative effect of the exact same right as it existed at common law. Thus, in the case of *Illinois Surety Co.* v. *United States*, 240 U.S. 214, this Court, in considering the Government's common law right of setoff, said: "Whether the amount so fixed is due, in law and fact, undoubtedly remains a question to be adjudicated as properly raised in judicial proceedings, . . ."[8] See also *Seaboard Surety Co.* v. *United States*, 67 F. Supp. 969, 971, *supra*.

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[8] This language of the Court in the *Illinois Surety Co.* case lends more support to respondent's view of *Grand Trunk Western Railway Co.* v. *United States*, 252 U.S. 112, 121, than to that of petitioner. In the latter case it was held that, where the Government had deducted from a current bill the amount of certain prior overpayments made for the transportation of mail, the United States "was under no obligation to establish the illegality [of the prior overpayment] by suit." Petitioner cites this case as standing for the proposition that, in a case involving a deduction from a current bill, the Government is relieved of the obligation to establish the correctness of the deduction when it asserts it as a counterclaim

The petitioner cites the recent decision of this Court in *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59, as support for its interpretation of section 322. That case involved three suits under the Tucker Act: to recover certain deductions made by the Government on account of alleged overpayments made to respondents Bangor and Seaboard; and to correct an underpayment to Western Pacific. In that case this Court was faced with three issues: (1) the application of the doctrine of primary jurisdiction; (2) the application of the two-year period of limitation contained in section 16(3) of the Interstate Commerce Act; and (3) the dismissal of the Government's claim of estoppel as to respondents Bangor and Seaboard. This Court did not have before it the question of the effect of section 322 in adding to the burdens of a carrier-plaintiff or the effect of section 322 as relieving the burdens of the Government as a counterclaimant.

The petitioner urges that the language of this Court in deciding the inapplicability of the two-year period of limitations simultaneously stands for the proposition that an acceptance of a pre-audit payment by a rail carrier is conditional upon the later determination by the Government

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in a suit brought by the carrier for transportation charges. Thus the petitioner would have us believe that the Court in the *Grand Trunk* case meant that the United States did not at any time have to establish the fact of overpayment in any judicial proceeding and no matter under what circumstances the question of overpayment arose; whereas the respondent says that the true construction of that holding is that as a first step to the act of making the deduction there is no requirement that the Government institute legal action against the carrier to bring about a determination that in fact there was an overpayment. Stated another way, the Government can make its own determination of overpayment without making any offer of proof as to the basis for such determination, unless and until it asserts such overpayment as setoff in a judicial proceeding. At such time it must meet the requirements of such proceeding.

of overpayment being a finality. Respondent here is not in disagreement with the holding of this Court that as to Bangor and Seaboard the Government did not have to file anticipatory suits but, rather, it could deduct under section 322. Likewise, this respondent does not disagree with the statement of this Court in the *Western Pacific* case that it was not the purpose of Congress in enacting section 322 that the utilization of that section by the Government would bar its right to raise issues such as the unreasonableness of a classification or rate. Nothing in the language of this Court in the *Western Pacific* case can be construed as a determination that the Government does not have to pay before audit unless the carrier by voluntary agreement or by operation of section 322 itself accepts as final a later determination by the Government that an overpayment had been made.

As a matter of fact, the *Western Pacific* case strongly supports the position of the respondent here. In that case the Government did exactly what it is contending it does not have to do in this case, namely, offer a proof of its counterclaim. In the *Western Pacific* case the Government claimed its overpayment was the difference between a rate for carriage of napalm gel in the classification as an incendiary bomb as against the classification as a non-incendiary bomb.

In that case the Government did not sit back and claim that Bangor and Seaboard had to prove the Government's contentions. No indeed. Rather, the Government offered its own proof of its counterclaim. The Government said that the overpayment was proved by a ruling of the Official Classification Committee, a railroad tariff agency to which both Bangor and Seaboard belonged, that that type of napalm gel bomb shipment would be carried at a lower rate. As to that evidence of the Government's position, this Court, after review, said: "It appears to be undisputed that the

ruling in question was not rescinded until after all of those shipments had been made." By affidavit the Government had indicated that it was prepared to go further with proof of its counterclaim by showing that it had relied on that ruling to its detriment. It was at this point that the lower Court refused to allow the Government to go forward on the theory of estoppel. It was the satisfactory showing on the part of the Government that it did have facts in support of its counterclaim that caused this Court to rule that the Court of Claims had erred in disposition of the case by summary judgment, and to state that the evidence presented by the Government was sufficient to entitle it to an opportunity to prove reliance and detriment.

Petitioner here does not attempt to explain why the Government accepted its burden of proof as a counterclaimant in the *Western Pacific* case and did not do so in the case at bar. Certainly the fact of existence or non-existence of such proof should not be the controlling factor. In any event, there is no real conflict between the reference by this Court in the *Western Pacific* case to section 322 and the holding by the Court of Appeals in this case as to that section.

B. Contrary to its Contention, Petitioner has Not Made Out a Prima Facie Case on its Counterclaim.

Apparently petitioner concedes the possibility that the holdings of the District Court and of the Court of Appeals herein is the law. Petitioner asserts that it has met its burden of proof on its counterclaim by a showing that the respondent's charges for the 1944 transportation services were incorrect.

The only "showing" by petitioner that appears on the record of this case is the statements by petitioner in answer

to respondent's interrogatories (1) that cars of the sizes ordered were not furnished; (2) that petitioner is without knowledge as to whether a car of the size ordered was available; and (3) that a Reviewer and an Examiner of the Transportation Division, United States General Accounting Office, in the performance of their official duties, "determined" that the amount charged by respondent was an excessive charge.[9] It can be seen that in truth the General Accounting Office made no genuine determination that there had actually been an overpayment. It claimed a credit for the difference between the amounts properly chargeable for the use of the freight cars actually supplied by the initial carrier and the amounts properly chargeable for the freight cars of the sizes requested. But, as the Court of Appeals pointed out, whether or not there was an overcharge depended upon the establishment of an extrinsic fact, namely, whether at the time and place the initial carrier was able to supply freight cars of the sizes ordered. Said the Court: "In other words, the government's so-called post-audit did not undertake to determine the important extrinsic fact necessary to be established in order to sustain the claimed setoff" (R. 45).

The question of whether or not the initial carrier could supply the car of the size ordered involves the applicability

[9] Respondent's interrogatories addressed to the petitioner appear on pages 6 to 20 of the Transcript of Record. Petitioner's answers appear on pages 20 to 28 therein; and petitioner's objections to respondent's interrogatories appear on page 28 of the Record. It will be recalled that the hearing in the District Court was scheduled upon those objections, but that petitioner offered no support of those objections and instead caused the hearing to be cast as a pretrial conference and a submission resulting in the decision of the District Court. In the interrogatories respondent asked a series of eighteen questions concerning each car involved. They appear as questions numbered 7-24, 25-42, 43-60, 61-78 and 79-96, respectively.

of an Interstate Commerce Commission regulation entitled Service Order No. 68.[10] That order was made and entered by the Commission on January 30, 1942, and was effective from February 15, 1942. There were twenty amendments to Service Order 68 during the period it was in force. The order was vacated and set aside by the Commission as of April 16, 1949. The order concerned itself with Rule 34 of Consolidated Freight Classification No. 14; and, more particularly, section 6(a) thereof, which is pertinent here. Section 6(a) of Rule 34 read as follows:

> "If carrier is unable to furnish open car of length ordered and furnishes longer car, minimum weight shall be that fixed for car furnished, except that if articles are of such length as could have been loaded on a car of length ordered, minimum weight shall be that fixed for car ordered."

Rule 34 was a good, work-a-day rule; a rule of convenience. Mainly held to be to the convenience of the railroads, the rule spread its benefits over both the shipper and the carrier. Traditionally held to the requirement of furnishing a car of the size ordered, this Rule 34 gave the railroads the opportunity of greater freedom in filling car orders while, at the same time, it protected the shipper from greater charges where its shipment could have been accommodated on the car it ordered. Rule 34 did not abrogate the shipper's privilege of refusing to accept any car other than that of the length it ordered, but it made such refusal unnecessary as a practical dollars-and-cents matter.

[10] 8 F.R. 8513; amended 8 F.R. 8513; 8 F.R. 14224, 16265; 9 F.R. 7206, 14306; 10 F.R. 6040, 8142, 9720, 12090; 11 F.R. 562, 6983; 12 F.R. 46, 3837, 4719, 4886, 8774; 13 F.R. 3185, 3738, 8220.

Service Order 68 suspended the provisions of section 6(a) of Rule 34. This had been deemed necessary by the Commission as an invaluable adjunct to the war effort because it was the fair and reasonable means of immediately preventing the misuse and the wasteful use of railroad equipment that was causing congestion of traffic. It is to be noted that Service Order 68 was ordained and promulgated by the Interstate Commerce Commission upon its own initiative and at no request of railroad carriers. As was stated by the Commission in one of its holdings:[11]

> "The service order was not issued for the purpose of increasing transportation charges paid by the shippers, nor to augment carriers' revenue, but to increase car loadings, to avoid car shortages and traffic congestion, and to expedite handling of shipments."

There can be no honest dispute of the fact that neither did the Interstate Commerce Commission intend nor did the state of war require any interpretation of Service Order 68 that would place upon railroad carriers more onerous conditions than those imposed upon shippers, including the United States. The question as to whether the railroad carrier in a given case was able to furnish the car ordered was the subject of complaint before the Commission on several occasions. The determinations in those cases indicated that the Commission intended that the successful operation of Service Order 68 had to be a co-operative venture. Both the carrier and the shipper were expected to do whatever was reasonable under the circumstances to guide the course of the application of that Order to insure the accomplishment of its purpose. Typical of those decisions was that in No. 29855, *Simmons Machine Tool Corp.*

[11] *Old Ben Coal Corp.* v. *Chicago, Burlington & Quincy Railroad Co.*, 262 I.C.C. 801 (decided March 19, 1945).

v. *Delaware & Hudson Railroad Corp.*[12] In that case the railroad charged the minimum for the size of the car furnished and used. There was a controversy as to what kind and size of car was actually ordered. The complainant said it had ordered a small, low-side gondola car. The railroad denied that and claimed the request was for a low-side car with no specification as to length or size. The Commission held:

> "It is unnecessary to decide that point, because the applicable tariffs did not permit charges to be collected on the basis of the minimum for the car ordered, but required charges to be collected at the minimum for the car used. Prior to February 15, 1942, certain tariff provisions did permit the carrier to charge on the basis of the car ordered when, for the carriers' own convenience, a larger car than ordered was furnished. But those provisions were suspended pursuant to Service Order 68 of this Commission on that date. The primary purpose of the service order was to eliminate the wasteful use of equipment. That it did not accomplish its purpose in this instance offers no reason for a finding of unlawfulness in the charges imposed. *The complainant could have mitigated its transportation costs by refusing to accept the larger car furnished and by insisting that it be furnished with a small car, such as it allegedly ordered.*" (Italics supplied.)

In the case at bar the petitioner had the same duty to mitigate its transportation costs. If there was the slightest evidence that the respondent was able to supply a car of the size ordered, the petitioner could not just sit back and rely upon some future accounting adjustment to make every-

[12] 270 I.C.C. 521 (decided May 12, 1948).

thing right. It must be remembered that the ones making the decisions as to excessive charges in this case were a Reviewer and an Examiner of the Transportation Division, United States General Accounting Office, "in the performance of their official duties" some five or six years after the transportation services had been performed.[13] Although respondent's interrogatory in each case asked for the basis for such determination, petitioner's answer each time was significantly silent on that point.

Likewise it should be remembered that three of the bills of lading involved here were signed by a Navy officer on behalf of the Inspector of Naval Material, Bureau of Supplies and Accounts, Navy Department, Detroit, Michigan;[14] one by the Resident Inspector of Navy Material, Knoxville, Tennessee;[15] and one on behalf of the Supply Officer, United States Naval Mine Depot, Yorktown, Virginia.[16] All of those were responsible persons in responsible positions. It is inconceivable that they would not have filed some sort of a complaint against the railroad carrier if there had been the slightest inkling that the railroad had been able to supply a car of the size ordered, but had not done so. It is unfortunate that petitioner chose to object to making answer to those interrogatories in each instance wherein respondent asked if any agent of the petitioner was present or available to have been present at the loading of the car furnished.[17] If none had been, it was simply a matter of answering "No."

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[13] See petitioner's answers to interrogatories 21(b), 39(b), 57(b), and 93(b), appearing in Record at pages 21, 23, 24, 26 and 27, respectively.

[14] Answers to interrogatories 8(b), 26(b), 44(b), R. 21, 22, 23.

[15] R. 25, answer 61(b).

[16] R. 26, answer 80(b).

[17] Interrogatories 12(a), (b); 30(a), (b); 48(a), (b); 66(a), (b); and 84(a), (b); see petitioner's objections, R. 28.

As a matter of fact, the petitioner has made no attempt at any showing that any attack by the Government upon Service Order 68 was in any way based upon the ability of the railroad to furnish a car of the size ordered.

There is no question but that the War Department was unhappy about Service Order 68. On October 30, 1943, the Secretary of War filed a Petition for Reconsideration and Modification of Service Order 68. The relief sought was the suspension of the order as it applied to War Department shipments. The railroads filed a reply to the petition; and the Interstate Commerce Commission issued a formal order denying the petition. Those items are set forth in Appendices A, B and C, respectively, in this Brief.

The thrust of the Secretary of War's complaint was the increased cost to the War Department resulting from the operation of Service Order 68. He made no charge that such increased costs were due to the railroad's furnishing a larger car when it was able to furnish a car of the size ordered. The only reference in the petition to the furnishing of cars was this: "In many instances, particularly in the case of open top equipment, the rail carriers are unable to furnish cars of the length required and ordered, and furnish cars which are greater in length than those required and ordered for the transportation of said shipments."[18] If there was any general tendency or even isolated instances of railroads furnishing a larger car than ordered when they were able to do otherwise, what better vehicle for disclosing such a practice than in a petition for suspension of the order? It is fair to say that the petitioner believed that the carrier furnished the car of the size ordered whenever it could.

In any event, the petition of October 30, 1943, shows clearly that the Government had done everything possible

[18] Appendix A, paragraph (4), p. 46, *post*.

to establish a constant source of information on the whole subject of the application of Service Order 68, including the means to know at all times if the railroads were not complying with the requirement of furnishing a car of the size ordered when able to do so. For example: "Petitioner has adopted and put into effect with respect to the transportation of War Department shipments such policies and practices as will insure the most efficient use of railway facilities and equipment, including the maximum loading of railway freight cars, consistent with military requirements." [19] The petition continues to elaborate a detailed and exhaustive routine that could not succeed if the Government did not know at all times whether the railroads were able at a given time to supply a car of the size ordered.

In addition, the petition relates: ". . . the investigation and spot checks which have been made of shipments at its numerous organizations and installations over an extended period of time . . ." [20] Those statements, made in its official petition to the Interstate Commerce Commission, establish conclusively that the Government had access to all the information necessary concerning the ability of the railroads to furnish a car of the size ordered.

The Interstate Commerce Commission denied the Secretary of War's petition of October 30, 1943.[21]

Under date of January 9, 1945, the Secretary of War filed another petition with the Interstate Commerce Commission, seeking again the suspension of Service Order 68 to the extent that it applied to War Department shipments. It was couched in substantially the same language as his 1943 petition, except that it emphasized the theory that, since the provisions of Rule 34 of Consolidated Freight

[19] Appendix A, paragraph (2), p. 44, *post*.

[20] Appendix A, paragraph (6), p. 48, *post*.

[21] Appendix C, p. 53, *post*.

Classification 14 affected only 10% of the available box cars as against 43% of available open-top cars, Service Order 68 was not accomplishing its stated purpose.[22] Before a reply was filed by the railroads or any action was taken by the Commission, the Secretary of War, by letter dated August 24, 1945, requested that the petition be withdrawn; which was done.

Contrary to the contention of the petitioner in this case, the facts determinative of whether the respondent was able to furnish a car of the size ordered are not within respondent's peculiar knowledge. The disclosures in the petitions by the Secretary of War in 1943 and 1945, referred to just above, conclusively establish that.

Interestingly, when petitioner here tries to prove its naked assertion that such facts are within the peculiar knowledge of respondent, it relies, at page 43 of its Brief, upon "uncontroverted statements" in support thereof. Amazingly, the "uncontroverted statements" turn out to be petitioner's answers to respondent's interrogatories. In view of the procedural history of this case, it is difficult to believe that petitioner seriously expects to prove anything by that "pull-yourself-up-by-the-bootstraps" device.

Petitioner appears to be confused in its understanding of the science of legal evidence. A statement does not become proof simply by its utterance. When the petitioner says in its Brief [23] that the burden may not be placed upon a litigant of establishing facts peculiarly within the knowledge of the adverse party, the mere say-so does not prove that the facts of this case give rise to the application of that

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[22] In the records of the Interstate Commerce Commission all items covering Service Order 68 are to be found in two volumes entitled "Car Service—3" and "Car Service—3A." The petitions are in "3A."

[23] P. 45.

principle. Wigmore has written:[24] "Each party wishes to know of what facts he has the risk of non-persuasion. By what considerations is this apportionment determined? Is there any simple rule which will solve all cases and afford a general test for ascertaining the incidents of this risk? By no means." "The burden of proving a fact is said to be put on the party who presumably has peculiar means of knowledge enabling him to prove its falsity, if it is false. But this consideration furnishes no universal working rule. This consideration, after all, merely takes its place among other considerations of fairness and experience as a most important one to be kept in mind in apportioning the burden of proof in a specific case. The trouble is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations." "There is, then, no one principle or set of harmonious principles which afford a sure and universal test for the solution of a given class of cases. There are merely specific rules for specific classes of cases, resting for their ultimate basis upon broad reasons of experience and fairness."

The respondent respectfully submits that, in the case at bar, experience and fairness dictate the complete absence of any peculiar knowledge on the part of respondent of an ability of the railroad carrier to supply a car of the size ordered. Time has not dimmed the common knowledge of the almost miraculous logistical achievement by the Government in the successful prosecution of the defense of this and other nations of the world during the period covered by this case. Indisputably, the Government's well-planned maneuvers in the maximum use of rail carrier facilities and equipment contributed to that success. Never could it have been accomplished unless the Government had known at all

[24] Wigmore on Evidence, section 2486, pages 274, 275 and 278.

times as much or more about the availability of those facilities and equipment than did the railroads.

Conclusion.

For the foregoing reasons it is respectfully submitted that the judgment below should be affirmed.

Respectfully submitted,

EDMUND M. SWEENEY,
Counsel,

ARTHUR D. HEALEY,
Assistant Counsel,

For the Respondent.

Appendix A.

BEFORE THE
INTERSTATE COMMERCE COMMISSION

IN RE: SERVICE ORDER 68.

PETITION FOR RECONSIDERATION
AND MODIFICATION

Now comes the Secretary of War, through his duly authorized counsel, The Judge Advocate General, and respectfully petitions the Commission to reconsider, modify, and set aside Service Order 68, made and entered by the Commission on the 30th day of January 1942 and subsequently amended, to the extent that said order suspends the operation and application of Sections 2 (a) and 6 (a) of Rule 34 of Consolidated Freight Classification No. 14, as amended and reissued, and of similar provisions in any other tariffs or car service rules filed by common carriers by railroad with the Commission, with respect to shipments made by or consigned to any organization or installation of the War Department. The aforementioned sections provide in substance that if a carrier is unable to furnish a car of the length ordered and furnishes a longer car, the minimum weight as to closed cars shall be that fixed for the car ordered, except that when the loading capacity of the car is used, the minimum weight shall be that fixed for the car furnished; and the minimum weight as to open cars shall be that fixed for the car furnished, except that if the articles are of such length that they could have been loaded on a car of the length ordered, the minimum weight shall be that fixed for the car ordered.

In support of said petition, your petitioner respectfully shows:

(1) Petitioner is the duly appointed and acting Secretary of War and as such has control and supervision over the transportation of troops and supplies for the War Department. The War Department is now the largest user of railroad transportation in the United States and petitioner, as Secretary of War, is vitally interested in the maintenance of an adequate and efficient system of railroad transportation as an important factor in the successful prosecution of the war. Petitioner is required to obtain the necessary transportation services by railroad and otherwise for War Department shipments at just and reasonable rates and charges and at the lowest cost consistent wit [*sic*] the furnishing of adequate and efficient service.

(2) Petitioner has adopted and put into effect with respect to the transportation of War Department shipments such policies and practices as will insure the most efficient use of railway facilities and equipment, including the maximum loading of railway freight cars, consistent with military requirements. For example, regulations prescribed by petitioner require that, in ordering cars for War Department shipments, the length of car desired shall be specified, taking into consideration the articles to be shipped and the weight and bulk thereof; and that carload shipments shall be loaded to the load limit or physical capacity, provided that, where a single shipment requires more than one car, no single car in the series required for such shipment shall be loaded below the minimum weight prescribed for the commodity in the carriers' classification and/or applicable tariffs, if the actual weight of the shipment permits of such loading. The Chief of Trans-

portation, acting under the direction of petitioner, on 15 June 1942 issued special instructions requiring War Department shippers and consignees to exert extraordinary efforts to conserve freight car equipment. Such instructions provided more specifically, inter alia, that precautions must be taken to load all cars to maximum carrying capacity or full visible capacity; that cars should not be ordered in excess of actual requirements; that empties should not be held for prospective loading; and that orders for cars should be placed as far in advance as possible, specifying the type and size of car, the time when the car is required, the commodity to be loaded, and the destination. Petitioner has also instituted appropriate measures designed to obtain compliance with these regulations and instructions. Bills of lading for War Department rail carload shipments are checked in the office of the Chief of Transportation to ascertain whether shipments have been made in compliance with such regulations and instructions, particularly with respect to the ordering of cars of proper length and the maximum loading of cars. If it appears that the regulations and instructions have not been complied with in the case of a particular shipment, further investigation is made to determine the circumstances surrounding the shipment and whether non-compliance was due to the nature of the article shipped, the emergency character of the shipment, or to the default of the person making the shipment. Where it is determined that the default of the person making the shipment was responsible for non-compliance, appropriate measures are taken.

(3) The Commission on the 30th day of January 1942 made and entered an order designated as Service Order 68, effective February 15, 1942, providing with respect to interstate commerce for the suspension of

the operation of Rule 24 of Consolidated Freight Classification No. 14, as amended; of Rule 34 of the aforesaid classification in so far as it permitted railway freight cars to be used for the shipment of carload freight otherwise than subject to the carload minimum weight for each car used; and of all provisions in all other tariffs filed by common carriers by railroad with the Commission which, in like manner as, or in modification or extension of, Rule 24 and of that portion of Rule 34 therein suspended, permit railway freight cars (whether such cars are loaded by shipper or carrier) to be used for the shipment of carload freight, including livestock, otherwise than subject to the established minimum weight for each car used. Subsequently, the Commission amended Service Order 68 by vacating it in so far as the order applied to the operation of tariff provisions and car service rules relating to the shipment of livestock. Service Order 68 was made and entered by the Commission as an emergency order upon its own initiative, without notice or hearing, and for the purpose of preventing misuse, wasteful use, and shortage of railway equipment and congestion of traffic.

(4) The War Department makes and receives numerous interstate shipments of carload freight by common carriers by railroad, the transportation charges on which are paid by the War Department. In many instances, particularly in the case of open top equipment, the rail carriers are unable to furnish cars of the length required and ordered, and furnish cars which are greater in length than required and ordered for the transportation of said shipments. Some of the shipments comprise commodities which are light loading, the weight of the quantity to be shipped barely

equaling or being less than the minimum weight for the length of car ordered. Many shipments consist of articles which are of such size and shape that only a certain number can be loaded, regardless of the length of the car furnished. For example, only three gun mounts of a particular type can be loaded in a car, whether the car is 40 or 50 feet long. A great many shipments of War Department freight are of an emergency character and must be loaded and transported promptly in whatever cars are available at the time and place of shipment. Due to the emergency character of the shipments and the inability of the carriers to furnish cars of the length ordered, it is necessary to use the cars furnished by the carriers for the transportation of such shipments, even though the cars are longer than required and ordered and the circumstances of the particular shipment make it impossible to utilize the full capacity of the cars. A considerable number of shipments of this character are subject to Rule 34 of the Consolidated Freight Classification. The provisions of Service Order 68, as amended, require, however, that the carriers assess and collect from the War Department charges based upon the minimum weight established for the length of the car furnished by the carrier and used in the transportation of the shipment, notwithstanding the fact (a) that the minimum weight for the car furnished exceeds the minimum weight for the car ordered and the actual weight of the shipment, (b) that in box cars the loading capacity of the car furnished was not used, and (c) that on open top equipment the lengths of the article or articles shipped were such that they could have been loaded on the car ordered.

(5) Service Order 68, as amended, in so far as it affects shipments made by or to installations of the

War Department, does not result in heavier loading and a more efficient use of railway cars than would exist without said order. On the contrary, and for the reasons previously stated, the application of the order has resulted in the assessment to the War Department of increased transportation charges which are excessive and unjust and unreasonable. Said order has caused, and, so long as it is made applicable to War Department traffic, will continue to cause, a substantial increase in the aggregate amount paid or to be paid by the War Department for transportation services required in the prosecution of the war, a result which, in the opinion of your petitioner, was not contemplated or intended at the time when the order was issued.

(6) Petitioner is unable, from the information now available, to state the precise amount by which the transportation charges of the Department have been increased as a result of said order, but the investigation and spot checks which have been made of shipments at its numerous organizations and installations over an extended period of time indicate conclusively that the amount of such increase has been and will continue to be substantial. Exhibit A, attached hereto and made a part hereof, contains a representative list of shipments on which increased transportation charges have accrued as a result of the application of Service Order 68, as amended.

WHEREFORE, petitioner requests that the Commission reconsider, modify, and set aside Service Order 68, as amended, to the extent that said order suspends, as to shipments made by or to any organization or installation of the War Department, the operation and application of Sections 2 (a) and 6 (a) of Rule 34 of Consolidated Freight Classi-

fication No. 14, as amended and reissued, and of similar provisions in any other tariffs or car service rules filed by common carriers by railroad with the Commission, and that the Commission make such other and further orders as shall be reasonable and proper in the premises.

Dated at Washington, D.C. this 30th day of October 1943.

MYRON C. CRAMER,
Major General,
The Judge Advocate General
for the Secretary of War
By MASTIN G. WHITE
Mastin G. White
Colonel, J. A. G. D.,
Chief, Litigation Division.
3726 Munitions Building

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing petition upon the Association of American Railroads, Washington, D. C., by mailing by first-class mail ten copies thereof, properly addressed to said Association.

Dated at Washington, D. C., this 30th day of October, 1943.

MASTIN G. WHITE
Mastin G. White,
Colonel, J. A. G. D.,
Chief, Litigation Division.
3726 Munitions Building

Exhibit A.

Representative List of Rail Carload Shipments By or To Organizations or Installations of the War Department Showing Increased Charges Resulting from I.C.C. Service Order 68.

No.	Commodity	From	To	Weight (Actual or Tariff Estimated Weight)	Car Ordered: Lgth.	Car Ordered: Minimum	Car Furnished: Lgth.	Car Furnished: Minimum	Freight Charges Assessed Pursuant to I.C.C. Service Order 68	Freight Charges if I.C.C. Service Order 68 had not been applicable	Excess Charges: Amount	Excess Charges: Percent
(a)	Freight—Autos	Ft. Custer, Mich.	Los Angeles, Calif.	18075	50'6"	15,000	53'6"	24,000	$1,274.40	$610.94	$663.46	108.5
(b)	Tractors	Ill.	S.D.	17625	36'0"	24,000	42'0"	29,280	313.30	256.80	56.50	22.0
(c)	Trailers	Fla.	N.Y.	11000	46'0"	28,400	50'0"	32,400	456.84	400.44	56.40	14.1
(d)	Road Roller	Ohio	Ga.	20000	40'0"	26,880	46'0"	34,080	402.14	317.18	84.96	26.8
(e)	Army Half Tracks	Ill.	Ohio.	28000	40'0"	26,880	45'0"	39,080	85.92	61.60	24.32	39.5
(f)	Trailers	Mich.	Calif.	18000	36'0"	24,000	46'0"	28,400	564.00	530.35	33.65	6.4
(g)	Passenger Autos	N.Y.	Calif.,	6835	36'0"	10,000	50'0"	12,000	636.00	530.00	106.00	20.00
(h)	Freight Autos	Wisc.	Ga.	24000	50'0"	12,500	2-42'	25,000	512.50	492.00	20.50	4.2
(i)	Oil Heaters	Iowa	Calif.	15892	40'0"	20,000	50'0"	24,000	420.00	350.00	70.00	20.0

Appendix B.

BEFORE THE
INTERSTATE COMMERCE COMMISSION
SERVICE ORDER No. 68

RAILROADS' REPLY TO PETITION OF SECRETARY OF WAR.

Now come the railroads, parties to Consolidated Classification No. 14, and in reply to the petition of the Secretary of War for reconsideration and modification of Service Order No. 68 respectfully state.

The petition is without merit and should be denied. Service Order No. 68 is but one of many service orders that have been issued by the Commission during the present war emergency, all aimed at the common purpose of avoiding a breakdown in rail transportation. Its particular purpose is to aid in the conservation of equipment by avoiding unnecessary delay on the part of the railroads in supplying cars for loading and by encouraging the maximum utilization of such cars as are readily available for use. It operates in the interest of all shippers, including the War Department and other departments and agencies of the Government. Indeed, in view of the present volume of Government traffic and of the vital importance of rail transportation in the successful prosecution of the war, it may be said that the order operates in the interest of the Government above all.

While it may well be true that some of the traffic of the War Department is of such character as to make it impossible to load any more in a large than in a small car, it is difficult to accept the statement of the Secretary of War

that such is true of all its traffic. In any event, as already stated, the heavier loading of cars is but one objective of the order. An equally important purpose is the avoidance of unnecessary delays and unnecessary switching and other operations in filling orders for cars. To the extent that it accomplishes either purpose, the increased charges which it imposes upon the War Department represent but a small price for the Government to pay for the benefits accruing to it therefrom.

Both in the interest of accomplishing its purpose and in the interest of treating all shippers alike, the order should continue to apply to all departments of the Government. It is to be remembered that we are not here considering a tariff rule established by the railroads, but an emergency regulation prescribed by the Commission. Certainly the Government should not put itself in the position of prescribing a rule for application to shippers generally to which it as a shipper, is not willing to conform.

Respectfully submitted,

J. M. SOUBY

Attorney for above named railroads

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the Secretary of War by mailing by first-class mail a copy thereof to his attorney, Colonel Mastin G. White, 3726 Munitions Building, Washington, D. C.

Dated at Washington, D. C. this ninth day of November, 1943.

J. M. SOUBY

J. M. SOUBY

Appendix C.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION held at its office in Washington, D.C., on the 6th day of March, A.D., 1944.

In Re: Service Order No. 68.

Upon further consideration of the provisions of Service Order No. 68, as amended, and the petition of the Secretary of War, dated October 30, 1943, requesting "that the Commission reconsider, modify, and set aside Service Order No. 68, as amended, to the extend [*sic*] that said order suspends, as to shipments made by or to any organization or installation of the War Department, the operation and application of Sections 2 (a) and 6 (a) of Rule 34 of Consolidated Freight Classification No. 14, as amended and reissued, and of similar provisions in any other tariffs or car service rules filed by common carriers by railroad with the Commission":

It is ordered, That said petition be, and it is hereby, denied.

By the Commission.

W. P. Bartel,
W. P. Bartel,
Secretary.

(SEAL)